

1 **UNITED STATES DISTRICT COURT**2 **DISTRICT OF NEVADA**

3 ROBERTO DURAND,

Case No.: 3:21-cv-00233-MMD-WGC

4 Plaintiff

Report & Recommendation of
United States Magistrate Judge

5 v.

6 AMY A. COFFEE,

7 Defendant

8 Re: ECF Nos. 1, 1-1

9 This Report and Recommendation is made to the Honorable Miranda M. Du, United
10 States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to
11 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

12 Plaintiff has filed an application to proceed in forma pauperis (IFP) (ECF No. 1) and pro
13 se complaint (ECF No. 1-1).

I. IFP APPLICATION

14 A person may be granted permission to proceed IFP if the person “submits an affidavit
15 that includes a statement of all assets such [person] possesses [and] that the person is unable to
16 pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense
17 or appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1).

18 The Local Rules of Practice for the District of Nevada provide: “Any person who is
19 unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP].
20 The application must be made on the form provided by the court and must include a financial
21 affidavit disclosing the applicant’s income, assets, expenses, and liabilities.” LSR 1-1.

1 “[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some
2 particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
3 (quotation marks and citation omitted). A litigant need not “be absolutely destitute to enjoy the
4 benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

5 An inmate submitting an application to proceed IFP must also “submit a certificate from
6 the institution certifying the amount of funds currently held in the applicant’s trust account at the
7 institution and the net deposits in the applicant’s account for the six months prior to the date of
8 submission of the application.” LSR 1-2; *see also* 28 U.S.C. § 1915(a)(2). If the inmate has been
9 at the institution for less than six months, “the certificate must show the account’s activity for
10 this shortened period.” LSR 1-2.

11 If a prisoner brings a civil action IFP, the prisoner is still required to pay the full amount
12 of the filing fee. 28 U.S.C. § 1915(b)(1). The court will assess and collect (when funds exist) an
13 initial partial filing fee that is calculated as 20 percent of the greater of the average monthly
14 deposits or the average monthly balance for the six-month period immediately preceding the
15 filing of the complaint. 28 U.S.C. § 1915(b)(1)(A)-(B). After the initial partial filing fee is paid,
16 the prisoner is required to make monthly payments equal to 20 percent of the preceding month’s
17 income credited to the prisoner’s account. 28 U.S.C. § 1915(b)(2). The agency that has custody
18 of the prisoner will forward payments from the prisoner’s account to the court clerk each time
19 the account exceeds \$10 until the filing fees are paid. 28 U.S.C. § 1915(b)(2).

20 Plaintiff’s certified account statement indicates that his average monthly balance for the
21 last six months was \$4.79, and his average monthly deposits were \$16.67.

22 Plaintiff’s application to proceed IFP should be granted. Plaintiff is required to pay an
23 initial partial filing fee in the amount of \$3.33 (20 percent of \$16.67). Thereafter, whenever his

1 prison account exceeds \$10, he must make monthly payments in the amount of 20 percent of the
 2 preceding month's income credited to his account until the \$350 filing fee is paid.

3 **II. SCREENING**

4 **A. Standard**

5 Under the statute governing IFP proceedings, "the court shall dismiss the case at any time
 6 if the court determines that-- (A) the allegation of poverty is untrue; or (B) the action or appeal--
 7 (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii)
 8 seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.
 9 § 1915(e)(2)(A), (B)(i)-(iii).

10 In addition, under 28 U.S.C. § 1915A, "[t]he court shall review, before docketing, if
 11 feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in
 12 which a prisoner seeks redress from a governmental entity or officer or employee of a
 13 governmental entity." 28 U.S.C. § 1915A(a). In conducting this review, the court "shall identify
 14 cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--
 15 (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks
 16 monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b)(1)-(2).

17 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
 18 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and
 19 28 U.S.C. § 1915A(b)(1) track that language. As such, when reviewing the adequacy of a
 20 complaint under these statutes, the court applies the same standard as is applied under Rule
 21 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Review under Rule
 22 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232
 23 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

1 The court must accept as true the allegations, construe the pleadings in the light most
2 favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*,
3 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are "held to less
4 stringent standards than formal pleadings drafted by lawyers[.]" *Hughes v. Rowe*, 449 U.S. 5, 9
5 (1980) (internal quotation marks and citation omitted).

6 A complaint must contain more than a "formulaic recitation of the elements of a cause of
7 action," it must contain factual allegations sufficient to "raise a right to relief above the
8 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading
9 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]
10 a legally cognizable right of action." *Id.* (citation and quotation marks omitted). At a minimum, a
11 plaintiff should include "enough facts to state a claim to relief that is plausible on its face." *Id.* at
12 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

13 A dismissal should not be without leave to amend unless it is clear from the face of the
14 complaint that the action is frivolous and could not be amended to state a federal claim, or the
15 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
16 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

17 **B. Plaintiff's Complaint**

18 Plaintiff brings this civil rights complaint under 42 U.S.C. § 1983 against his public
19 defender Amy Coffee. Plaintiff alleges that Ms. Coffee sexually harassed him during his attorney
20 visits by touching him and telling Plaintiff to expose himself to her, asked him to masturbate for
21 her, grabbed his private part, and wrote to him asking if Plaintiff had any "special requests."
22 Plaintiff's complaint references the Fourth, Fifth, Eighth, and Fourteenth Amendments.

1 Sexual harassment and unwanted sexual contact may violate the Eighth and Fourteenth
2 Amendments depending on the inmates status as a pretrial detainee or convicted defendant. *See*
3 *Vazquez v. County of Kern*, 949 F.3d 1153, 1160-63 (9th Cir. 2020) (acknowledging a “right to
4 bodily privacy, right to bodily integrity, and the right to be free from punishment as guaranteed
5 by the Fourteenth Amendment”); *Wood v. Beauclair*, 692 F.3d 1041, 1046 (9th Cir. 2012)
6 (citations omitted)(noting that sexual harassment or abuse may violate the Eighth Amendment);
7 *Denmery v. Arpaio*, 378 F.3d 1020, 1029 (9th Cir. 2004).

8 In *Polk County v. Dodson*, 454 U.S. 312 (1981), the Supreme Court held that generally a
9 public defender does not act under color of state law so as to be subject to suit under section
10 1983. “[A] person acts under color of state law only when exercising power ‘possessed by virtue
11 of state law and made possible only because the wrongdoer is clothed with the authority of state
12 law.’” *Id.* at 318 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). A defense attorney
13 “best serves the public, not by acting on behalf of the State or in concert with it, but rather by
14 advancing the ‘undivided interests of his client.’” *Id.* at 318-19. “This is essentially a private
15 function, traditionally filled by retained counsel, for which state office and authority are not
16 needed.” *Id.* at 319. Thus, a public defender “does not act under color of state law when
17 performing a lawyer’s traditional functions as counsel to a defendant in a criminal proceeding.”
18 *Id.* at 325.

19 The court noted, however, that there may be times when a public defender does act under
20 color of state law, such as “when making hiring and firing decisions on behalf of the State” or
21 “while performing certain administrative and possibly investigative functions.” *Id.* at 324-25
22 (citations omitted).

1 Here, the alleged conduct occurred while Ms. Coffee was acting as Plaintiff's public
2 defender, and not while performing another function which might bring the conduct under color
3 of state law. If true, the alleged conduct is reprehensible; however, it is not actionable against a
4 public defender under section 1983. Therefore, Plaintiff's complaint against Ms. Coffee should
5 be dismissed with prejudice.

6 **III. RECOMMENDATION**

7 IT IS HEREBY RECOMMENDED that the District Judge enter an order:

8 (1) **GRANTING** Plaintiff's IFP application (ECF No. 1); however, Plaintiff is required
9 to pay, through NDOC, an initial partial filing fee in the amount of \$ 3.33, within thirty
10 days of the entry of any order adopting and accepting this Report and Recommendation.
11 Thereafter, whenever his prison account exceeds \$10, he is required to make monthly
12 payments in the amount of 20 percent of the preceding month's income credited to his
13 account until the full \$350 filing fee is paid. This is required even if the action is
14 dismissed, or is otherwise unsuccessful. The Clerk should be directed to **SEND** a copy of
15 an order adopting and accepting this Report and Recommendation to the attention of
16 **Chief of Inmate Services for the Nevada Department of Corrections**, P.O. Box 7011,
17 Carson City, Nevada 89702.

18 (2) The complaint (ECF No. 1-1) should be **FILED**.

19 (3) The action should be **DISMISSED WITH PREJUDICE**.

20 Plaintiff should be aware of the following:

21 1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
22 this Report and Recommendation within fourteen days of being served with a copy of the Report
23 and Recommendation. These objections should be titled "Objections to Magistrate Judge's

1 Report and Recommendation" and should be accompanied by points and authorities for
2 consideration by the district judge.

3 2. That this Report and Recommendation is not an appealable order and that any notice of
4 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
5 until entry of judgment by the district court.

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7 Dated: August 6, 2021

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9 William G. Cobb
10 United States Magistrate Judge

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